

FILED
Court of Appeals
Division II
State of Washington
11/16/2022 11:59 AM
No. 56950-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARTY MOORE, as personal representative of the
Estate of Rebecca Moore,

Appellant,

v.

FRED MEYER STORES, INC. a foreign corporation,
registered and doing business in Washington; FRED
MEYER, INC., a corporation registered and doing
business in Washington; THE KROGER CO., a foreign
corporation registered and doing business in Washington;
each of them d/b/a FRED MEYER; and BLACK AND
WHITE I-V, businesses licensed to conduct business in
Washington; DOES I-V, employees and/or agents of
defendants FRED MEYER, INC.,

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION	1
REPLY STATEMENT OF THE CASE.....	2
REPLY ARGUMENT	4
A. The standard of review is <i>de novo</i>	4
B. Court’s Inst. No. 14 clearly misstates the law under Johnson , but Fred Meyer does not even attempt to rebut the presumption of prejudice.....	4
1. Johnson is on point and controlling.	7
2. Fred Meyer’s historical analysis is irrelevant.	8
3. Fred Meyer’s attempt to limit Johnson’s holding to a mere “clarification” is inaccurate and unavailing.	9
4. Fred Meyer cannot and does not deny that Moore presented evidence that its nature and operations make hazardous conditions reasonably foreseeable.	13
5. Fred Meyer misstates Moore’s proposed instruction.	16
CONCLUSION.....	21

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Anfison v. FedEx Grnd. Pack. Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012)	6
<i>Johnson v. Wash. State Liquor & Cannabis Bd.</i> , 197 Wn.2d 605, 486 P.3d 125 (2021) 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 20	
<i>Lake Hills Invs., LLC v. Rushforth Constr. Co.</i> , 198 Wn.2d 209, 494 P.3d 410 (2021)	5
<i>Mucsi v. Graoch Assocs. Ltd. P'ship No. 12</i> , 144 Wn.2d 847, 31 P.3d 684 (2001)	11
<i>Paetsch v. Spokane Dermatology Clinic, PS</i> , 182 Wn.2d 842, 348 P.3d 389 (2015)	5
<i>Pimentel v. Roundup Co.</i> , 100 Wn.2d 39, 666 P.2d 888 (1983) 1, 4, 5, 10, 11, 15	

INTRODUCTION

Washington law regarding notice to a business owner of hazardous conditions on its premises is controlled by ***Johnson v. Wash. State Liquor & Cannabis Bd.***, 197 Wn.2d 605, 486 P.3d 125 (2021). ***Johnson*** recognized the reasonable foreseeability exception to the traditional notice requirements (knew or should have known) as the *general rule* in Washington. 197 Wn.2d at 618 (citing ***Pimentel v. Roundup Co.***, 100 Wn.2d 39, 666 P.2d 888 (1983)). Now, business invitees who slip-and-fall in Washington stores may prove notice by showing that the nature of the proprietor's business and its methods of operation make the existence of unsafe conditions on their premises reasonably foreseeable. *Id.*

The trial court refused to so instruct the jury in this matter. Its instruction thus clearly misstated the law. Fred Meyer does not even attempt to rebut the presumption of prejudice. This Court should reverse and remand for trial.

REPLY STATEMENT OF THE CASE

Fred Meyer's Statement of the Case is largely consistent with the opening brief's Statement. *Compare* BA 3-6 *with* BR 6-13. But in its Argument, Fred Meyer misconstrues the facts. *See* BR 31. There, it claims that its Manager Johnson "walked the aisle multiple times a day" but "did not remember finding a puddle of water in that aisle before the accident that injured" Moore. *Id.* (citing RP 62:4-64:5; CP 351:15-353:8; RP 155:13-156:5). None of Fred Meyer's cites supports its assertion.¹

Its only relevant cite, RP 155:13-156:5, is Johnson's testimony on cross claiming that *generally* he was in that aisle every day, multiple times a day, and that he did not

¹ Its first cite (RP 62:4-65:5) literally has nothing to do with Johnson (it is the judge explaining to the jury the admission of a deposition during opening statements). Its second cite (CP 351:15-353:8) is Moore's deposition, but she does not talk about Johnson walking the aisle. To be fair, these cites were probably intended to support the *other* portions of Fred Meyer's compound sentence. *See* BR 31.

“frequently” or “ever” find puddles of water in that aisle. RP 155-56. Johnson did *not* testify that he walked down that aisle on the day Moore fell without finding water there, much less doing so *before* she fell. *Id.*

Rather, Johnson inspected the aisle *after* Moore fell, but discovered that the water was already cleaned up. RP 87, 148. And he admitted that associates are not instructed to regularly inspect the aisles, but rather to randomly walk down different aisles throughout the day. RP 162-63. Fred Meyer thus overstates the record in claiming that Johnson was in the aisle where Moore fell before she did so. ²

² It may bear noting that Fred Meyer mistakenly refers to Rebecca Moore as “Mrs. Johnson” at BR 10. This is undoubtedly just a typo.

REPLY ARGUMENT

A. The standard of review is *de novo*.

Fred Meyer agrees that the standard of review for whether a jury instruction correctly states the law is *de novo*. BR 13. It asserts that instructions on “matters of fact” are reviewed for abuse of discretion, but appears to acknowledge that the issue here is whether the trial court correctly stated the law. BR 13-32. Review is *de novo*.

B. Court’s Inst. No. 14 clearly misstates the law under *Johnson*, but Fred Meyer does not even attempt to rebut the presumption of prejudice.

The opening brief explained that the trial court’s instruction clearly misstated the law, which changed significantly with the Supreme Court’s decision in ***Johnson***. BA 8-14. That decision holds that current Supreme Court precedent

has made the [reasonable foreseeability] exception from *Pimentel* into a *general rule* that an invitee may prove notice with evidence that the “nature of the proprietor’s business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.”

Johnson, 197 Wn.2d at 618 (emphases added) (quoting **Pimentel**, 100 Wn.2d at 49). Simply put, the “self-service requirement of the exception no longer applies.” *Id.* Yet the trial court refused to instruct the jury that Moore could prove notice to Fred Meyer with evidence that the nature of its business and operations are such that the existence of unsafe conditions on the premises is reasonably foreseeable. BA App. A, CP 728.

Since the trial court’s instruction clearly misstated – by omission – the controlling law, prejudice is presumed. See BA 7 (citing **Lake Hills Invs., LLC v. Rushforth Constr. Co.**, 198 Wn.2d 209, 216, 494 P.3d 410 (2021) (internal quotes and citations omitted)). This presumption arising from a clear misstatement of law can be overcome only by a showing that the error was harmless. **Paetsch v. Spokane Dermatology Clinic, PS**, 182 Wn.2d 842, 849, 348 P.3d 389 (2015) (citation omitted). Merely arguing that an instruction could have been correct *in other*

circumstances does not rebut the presumption of prejudice. See, e.g., **Anfison v. FedEx Grnd. Pack. Sys., Inc.**, 174 Wn.2d 851, 872-73, 281 P.3d 289 (2012).

And Fred Meyer nowhere even attempts to show harmless error to rebut the presumption. See BR. To be fair, however, that would be impossible: the trial court plainly had a duty to correctly instruct the jury on the controlling law. And indeed, Fred Meyer's response never actually questions **Johnson's** key holding quoted above. Compare 197 Wn.2d at 618 (quoted above) with BR 21.

Fred Meyer instead asserts that **Johnson** merely "clarified" the notice requirement, but "did not do away with other requirements and considerations for the exception." BR 4; see also BR 20-24. Not only does this misstate the general rule on reasonable foreseeability, but it is a red herring: the trial court incorrectly instructed the jury on the law. Prejudice is presumed. Fred Meyer does not even try to rebut the presumption. Reversal is required.

1. *Johnson* is on point and controlling.

Johnson is directly on point and controlling here, and Fred Meyer does not really argue otherwise. There and here, the “case concerns the proper *notice rule* governing premises liability actions brought by business invitees.” ***Johnson***, 197 Wn.2d at 607 (emphasis added). There and here, the store’s employee “testified that he was not aware of the presence of any water or any other hazardous condition on the floor” where the plaintiff slipped and fell. 197 Wn.2d at 608. Nor did the employee in either case “see any water on the floor on the spot where” the plaintiff fell. *Id.* In both cases, the plaintiff testified that her clothing was wet after the fall, but the employees testified that they did not notice any wet clothing. *Id.* And in both cases, the employee testified that no one had ever slipped and fallen in that area before. *Id.* at 609.

In ***Johnson***, as here, the defendant argued that the plaintiff must prove actual or constructive notice of the

unreasonably dangerous condition, but failed. *Id.* at 610. While that defendant argued the court should have granted Judgment as a Matter of Law, this matter involves the same *legal* issue: what is the proper *notice rule*? *Id.* at 607.

The answer is **Johnson's** "general rule" that Moore may prove notice with evidence that the nature and operations of the business make unsafe conditions reasonably foreseeable. *Id.* at 618. The trial court's failure to so instruct the jury was legal error as to which prejudice is presumed. Again, reversal is required as a matter of law.

2. Fred Meyer's historical analysis is irrelevant.

Fred Meyer expends a fair amount of ink on what it calls the "traditional" notice rule. BR 14-20. But while much of what it says there may be historically accurate, it does not matter what the notice rules *used to be*. Now, the general rule is that a plaintiff may prove notice by showing that the nature of Fred Meyer's business and operations

makes hazardous conditions reasonably foreseeable. Since the trial court did not so instruct the jury, prejudice is presumed. Fred Meyer does not argue harmless error. Reversal and remand are required.

3. Fred Meyer's attempt to limit *Johnson's* holding to a mere "clarification" is inaccurate and unavailing.

Fred Meyer misconstrues *Johnson's* holding as merely "clarifying" that the reasonable foreseeability exception can apply to non-self-service areas. BR 20-24. But *Johnson* holds that what used to be an exception is now the general rule. 197 Wn.2d at 618. As a result, the "self-service requirement of the exception no longer applies." *Id.* (emphasis added).

In short, every plaintiff may now prove notice by showing that the nature and operations of the business make hazardous conditions reasonably foreseeable. But the trial court refused to give the jury this controlling law.

Its legally incorrect instruction – omitting **Johnson’s** general rule of notice – is presumptively prejudicial.

And not telling the jury *how* Moore could prove notice of the danger to Fred Meyer was *in fact* highly prejudicial to her case. Instructing the jury about a “traditional” notice rule that no longer applies is obvious legal error. But in this case, the harm is even greater, *where the store in Pimentel was a Fred Meyer*. See 100 Wn.2d at 40. If – as **Johnson** unequivocally held – the “self-service requirement of the [**Pimentel**] exception no longer applies” *to Fred Meyer*, then *as a general rule*, the nature and operations of a Fred Meyer store is such that the existence of unsafe conditions on the premises is reasonably foreseeable *as a matter of law*.

The evidence that Fred Meyer argues is *part of* the new general rule on notice instead has *nothing to do* with notice. For instance, Fred Meyer argues that “a plaintiff must still prove that the condition at issue was dangerous”

to prove the former exception – now the general rule – of reasonable foreseeability. BR 22 (citing **Johnson**, 197 Wn.2d at 618-19). But what **Johnson** says there is that defendants’ alleged fears of “vastly increased liability” due to expansion of the **Pimentel** exception into a general rule are “unwarranted.” 197 Wn.2d at 619. This is because the “*other elements of a negligence claim*” do not “disappear” due to this expansion. *Id.* That is, *regardless of the notice issue*, proving “a dangerous condition remains an element of a premises liability claim.” *Id.* (citing, e.g., **Mucsi v. Graoch Assocs. Ltd. P’ship No. 12**, 144 Wn.2d 847, 859, 31 P.3d 684 (2001)).

The *other elements* of a plaintiff’s claim have nothing to do with how a plaintiff may prove *notice*. Fred Meyer’s arguments about other elements do not and cannot correct the trial court’s incorrect, and presumptively (and highly) prejudicial notice instruction. The trial court legally erred to Moore’s great prejudice.

Indeed, while Fred Meyer claims that the **Johnson** Court considered whether an unreasonably unsafe condition existed *in the midst of* its analysis regarding application of the reasonable foreseeability general rule regarding notice (BR 22-23, citing **Johnson** at 620), in fact **Johnson** there says: “Assuming that there was an *unreasonably dangerous condition*,” then there was evidence of the nature and operations of that store making hazardous conditions reasonably foreseeable. 197 Wn.2d at 620-21 (emphasis altered). While it is also true that in this context, the Court talked about the evidence that a hazardous condition existed, at that point the Court was addressing whether *Judgment as a Matter of Law* should have been granted on liability, *not* whether the reasonable foreseeability rule applies. *Id.* The error in this matter, by contrast, is failing even to instruct the jury on the general rule for proving notice through reasonable foreseeability. Fred Meyer’s reconstruction of **Johnson** is incorrect.

4. Fred Meyer cannot and does not deny that Moore presented evidence that its nature and operations make hazardous conditions reasonably foreseeable.

Fred Meyer nowhere argues that Moore failed to present evidence that the nature of its business and operations make hazardous conditions on its premises reasonably foreseeable. See BR. That is because Moore presented ample evidence on this, the *relevant* issue here. Specifically, one customer slips and falls every half-hour in affiliated stores nationwide – as *noticed* in Fred Meyer’s own training manuals. See BA 6. “Only” 10 employees slip and fall on an average day, notwithstanding the slip-resistant footwear provided to them. *Id.*

As a result, *every other aisle* in *this* Fred Meyer store is equipped with a “spill response kit” (e.g., paper towels, gloves, trash bags, and “spill magic” powder to soak up liquids). RP 119, 123. Associates are even encouraged to carry “pocket spill kits.” RP 135-36. They are trained to

clean up, cover, or stand over spills. RP 96, 119. Johnson himself claims to always be looking for spills. RP 137-38. Yet not one employee (from among 55 to 60 Associates in grocery alone) is assigned to monitor the aisles to protect Fred Meyers' customers. RP 161.³

This is more than enough evidence to show that the nature and operations of Fred Meyer stores makes hazardous conditions on its floors reasonably foreseeable. Indeed, Fred Meyer *obviously foresees slips and falls* in its stores and *in this aisle*. Yet the trial court failed to instruct the jury that such evidence proves notice to Fred Meyer, instead instructing them that Moore had to prove actual or

³ Fred Meyer also has standard "wet floor" signs. RP 125. Moore thought she saw a yellow warning sign lying on a shelf near where she slipped and fell in a significant amount of water; Manager Johnson acknowledged that there might have been one. CP 343-44, 384-49; RP 91-92; Ex 2. And *this aisle* had an anti-slip mat near the coffee self-serve. RP 89, 116.

constructive notice of the specific water she slipped and fell in. This was a highly prejudicial misstatement of the law.

And of course, as noted *supra*, since the ***Pimentel*** exception is now the general rule, the error is manifest, where ***Pimentel*** itself involved a Fred Meyer. While Fred Meyer tries to deny this point (see, e.g., BR 24-27) its logic is inescapable: In ***Pimentel***, the limitation on the reasonable foreseeability exception to actual or constructive notice was whether the injury occurred in a self-service area of a Fred Meyer; it *did* occur there, so it *was* reasonably foreseeable to Fred Meyer. But after ***Johnson***, the self-service limitation no longer applies, so - *as a general rule – hazardous conditions in Fred Meyer stores are reasonably foreseeable due to the nature and operations of its business – which frankly is entirely self-service in any event.*

This Court should reverse and remand for trial.

5. Fred Meyer misstates Moore's proposed instruction.

Fred Meyer challenges Moore's proposed instruction because it "would not have tasked the jury with determining whether the allegedly dangerous condition, the puddle of water, had a sufficient connection to the business and method of operation where the slip and fall occurred." BR 30-31. This is incorrect.

Moore's proposed instruction was practically *identical* to the Court's Instruction, except for the *notice* provision, subsection (a). *Compare* BA App. B, CP 235 (Moore's proposed instruction):

An owner of premises is liable for any physical injuries to its customers caused by a condition on the premises if:

(a) the nature of the proprietor's business and its methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable; and

(b) the owner should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and

(c) the owner fails to exercise ordinary care to protect them against the danger; and

(d) the dangerous condition is within those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

with BA App. A, CP 728 (Court's Inst. No. 14):

An owner of premises is liable for any physical injuries to its business invitees caused by a condition on the premises if the owner:

(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such business invitees;

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and

(c) fails to exercise ordinary care to protect them against the danger; and

(d) the dangerous condition is within those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

If Moore's proposed instruction was missing something about *causation*, so was the Court's instruction.

But obviously, neither one was missing that element. Both required the jury to find that Fred Meyer (b) should expect Moore would not discover, realize, or protect herself from the hazard; (c) failed to exercise ordinary care to protect Moore against the hazard; and that (d) *the dangerous condition was within the portion of the premises that Moore was impliedly invited to use and might reasonably be expected to use*. Just like the Court's Instruction, Moore's instruction required a connection between the dangerous condition and Fred Meyer's business and methods of operation.

Indeed, Moore's instruction would have required *more connection* between Fred Meyer's business and operations and the hazardous condition than did the trial court's instruction. The Court's Instruction's subsection (a) addressed only Fred Meyer's knowledge of the condition, failure to exercise ordinary care to discover the condition, or whether it should have realized it involved an

unreasonable risk of harm to its customers. BA App. A, CP 728. In other words, it required *no* connection between Fred Meyer's business and operations and the hazardous condition. *Id.* That is why it is wrong on the law.

By contrast, subsection (a) of Moore's proposed instruction would have required the jury to find *a direct connection* between the nature of Fred Meyer's business and methods of operation and the unsafe condition, such that it was reasonably foreseeable. BA App. B, CP 235. The Court's Instruction's failure to require this connection *is the legal error in this matter.*

In any event, as detailed *supra*, Moore presented ample evidence regarding the connection between the hazard and Fred Meyer's business and operations. See *supra*, Argument § B.4. Fred Meyer *knows* about and makes *many* provisions against the risks presented by spilled liquids anywhere and everywhere in its stores. *Id. In this aisle*, it has a mat to prevent slips and falls. RP 89, 116.

While the specific risk it was guarding against there was coffee grounds or beans, it nonetheless was plainly aware of the danger of slipping and falling in this location.

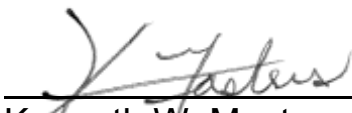
Yet Fred Meyer focuses on *Moore's* knowledge, as if that were a relevant consideration regarding *notice to Fred Meyer*. BR 31. It is not. The issue here is whether Fred Meyer's business and operations make hazardous conditions on its aisles reasonably foreseeable. They obviously do, as Fred Meyer expressly knows. But the trial court did not instruct the jury on the controlling law under ***Johnson***. This Court should reverse and remand.

CONCLUSION

This Court should reverse and remand for a fair trial under correct instructions.

RESPECTFULLY SUBMITTED this 16th day of November 2022.

MASTERS LAW GROUP, P.L.L.C.

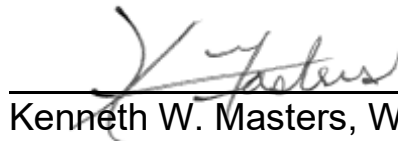


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Kenneth W. Masters, WSBA 22278
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I certify that I caused to be filed and served a copy of the foregoing **REPLY BRIEF** on the 16th day of November 2022 as follows:

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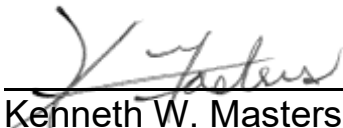
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November 16, 2022 - 11:59 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: Marty Moore, Appellant v. Fred Meyer Stores, Inc., et al., Respondents
Superior Court Case Number: 19-2-10000-7

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